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# UNITED STATES GOVERNMENT
# BEFORE THE NATIONAL LABOR RELATIONS BOARD

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**BEVERLY ENTERPRISES-MINNESOTA, INC.**
**d/b/a GOLDEN CREST HEALTHCARE CENTER**

**Cases 18-RC-16415**
**18-RC-16416**

**and**

**UNITED STEELWORKERS OF AMERICA,**
**AFL-CIO/CLC**

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## EMPLOYER'S SECOND REQUEST FOR REVIEW

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## EMPLOYER'S SECOND REQUEST FOR REVIEW

## I. PROCEDURAL HISTORY

This matter has a fairly long history, both in terms of the amount of time that has elapsed since the Union filed the petitions, as well as the number of steps that the parties have gone through to get this far. The additional time and the extra steps are mostly the result of the Supreme Court's decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001). Kentucky River is directly relevant insofar as the issue in this case is whether the Employer's RNs and LPNs are statutory supervisors.

On January 27, 1999, the United Steelworkers of America ("the Union") filed two representation petitions with the Eighteenth Region, seeking to represent two bargaining units of employees employed by Beverly Enterprises - Minnesota, Inc. d/b/a Golden Crest Healthcare Center ("Golden Crest" or "the Employer") — one bargaining unit consisting of RNs (18-RC-16415) and one consisting of LPNs (18-RC-16416).

After a pre-election hearing, the Regional Director issued a Decision and Direction of Elections on March 9, 1999. The Regional Director concluded that the petitioned-for units were appropriate, and he rejected the Employer's contention that the RNs and LPNs are statutory supervisors. On March 22, 1999, the Employer filed a Request for Review with the Board, which the Board denied approximately two weeks later on April 6.

The Union obtained a majority of votes in the election conducted on April 8, 1999.[1] The Regional Director issued the Certification of Representative shortly thereafter, on April 14.

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[1]A Sonotone election was conducted, and the RNs voted to be included in the same bargaining unit with the LPNs.

After the Employer refused to bargain in order to test the certifications, the Union filed an unfair labor practice charge (18-CA-15295). The Regional Director issued Complaint on July 29, 1999. On August 18, 1999, the General Counsel filed a motion for summary judgment, which the Board granted on September 17, 1999 (329 NLRB No. 22 (not reported in bound volumes)).

On September 29, 1999, Golden Crest filed its Petition for Review of the Board's Order in the Sixth Circuit Court of Appeals, requesting that the court vacate and set aside the Board's order. On October 26, 1999, the Board cross-petitioned for enforcement of its order. After the Union intervened, and upon the Union's motion, the Sixth Circuit issued an order transferring the case to the Eighth Circuit Court of Appeals on December 15, 1999.

While the case was pending before the Eighth Circuit, the Supreme Court issued its decision in Kentucky River, *supra*.[2] Because "the Board incorrectly applied the law in determining that [the Employer's] nurses were employees, rather than statutory supervisors," the Eighth Circuit, by order dated October 2, 2001, granted the Employer's petition for review, denied the Board's cross-petition for enforcement, and remanded the case back to the Board.

On April 24, 2002, the Board issued a Supplemental Decision and Order. By this Order, the Board vacated its Decision and Order in the unfair labor practice case (329 NLRB No. 22), and it remanded the underlying representation cases to the Regional Director for further consideration and to reopen the record to take additional evidence, if appropriate.

On remand to the Regional Director, both parties took the position that the record in Cases 18-RC-16415 & 18-RC-16416 was complete and should not be reopened. As a result, the Regional

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[2]Of course, in Kentucky River, the Court concluded that the Board has been applying the wrong test for supervisory status, at least with respect to the Board's interpretation and application of "independent judgment" when consisting of professional or technical judgment in directing employees.

Director issued a Supplemental Decision based upon the existing record. In the Supplemental Decision (dated August 20, 2002), the Regional Director concluded that Kentucky River did not require a different outcome from his original Decision and Direction of Election, issued back on March 9, 1999. Thus, the Regional Director affirmed his earlier determination that the Employer's RNs and LPNs are not statutory supervisors.

## II. BASES FOR REQUESTING REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, the Employer's Second Request for Review is based upon two grounds:

1. A substantial question of law or policy is raised because of the absence of and departure from officially reported Board precedent; and

2. The Regional Director made factual findings that are clearly erroneous on the record, and those erroneous findings prejudice the Employer.

## III. FACTS

The Regional Director's Supplemental Decision derives from the Board's remand, as set forth in its April 24, 2002 Supplemental Decision and Order. The Board remanded the underlying representation cases to the Regional Director for further consideration "on the issues of whether the Employer-Respondent's registered nurses and licensed practical nurses 'assign' and 'responsibly direct' other employees and on the scope or degree of 'independent judgment' used in the exercise of such authority." Thus, the Regional Director's Supplemental Decision and the Employer's Second Request for Review only address whether the RNs and LPNs are statutory supervisors by virtue of possessing these particular indicia of supervisory status.[3]

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[3]In the event that this case winds its way back up to the Eighth Circuit Court of Appeals, the Employer will continue to argue that the RNs and LPNs are statutory supervisors on the basis of other factors in addition to their authority to assign and direct employees.

The evidence contained in the record relating to the nurses' authority to direct and assign employees can be neatly summarized. The record demonstrates that the RN charge nurses possess and exercise the authority to:

- Redistribute work on the second floor, including making patient assignments or changes to the assignments. (Tr. 67).[4]
- Reassign an employee from the first floor to the second floor. (Tr. 67-68).
- Assign a CNA to perform a particular task based on the CNA's skill level. (Tr. 67-68).
- Independently instruct staff to leave early or stay late, depending on the workload. (Tr. 69).
- Mandate overtime or shortened shifts. (Tr. 69-70, 73).
- Approve a slip requesting an edit or revision of a CNA's computerized time clock entry. (Tr. 76-77).
- Act as the top authority in the facility on evenings and weekends. (Tr. 51-52, 181-182).

The LPNs-at-issue possess and exercise the authority to:

- Direct the work of CNAs on the first floor, which includes their work related to patient care and personal conduct. (Tr. 409-410).
- Reassign or move CNAs from section to section, as deemed necessary, which includes assigning patient cares to a CNA or redistributing work. (Tr. 410-411).
- Lengthen or shorten the shifts of CNAs. (Tr. 411).
- Mandate that employees come to work, using the call-in list by seniority. (Er. Ex. 61; Tr. 413-414).

## IV. ARGUMENT

The Employer's RNs and LPNs are statutory supervisors by virtue of the fact that they have the authority to direct and assign employees and that, in doing so, they exercise independent

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[4]Citations to Tr. followed by a page number are to the transcript from the pre-election hearing.

judgment.

By way of review, Section 2(11) expressly defines the term "supervisor" to mean "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Section 2(11) sets forth a three part test for determining supervisory status; employees are supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." Kentucky River, 121 S.Ct. at 1867 (*citing* NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574 (1994)).

In Kentucky River, the Court considered what it means to exercise "independent judgment" when *directing* other employees — one of the twelve listed supervisory functions. Up to the Court's decision in Kentucky River, it was the view of the Board that nurses did not use independent judgment when exercising *ordinary professional or technical judgment* in directing less-skilled employees to deliver services in accordance with employer-specified standards. *See, e.g.*, Providence Hospital, 320 NLRB 717, 729 (1996). In other words, an individual was not a supervisor by virtue of directing employees, if the direction was the product of the individual's professional or technical skill, training, or experience. The court rejected this rule in Kentucky River. Thus, under the Court's decision, an individual who exercises a substantial degree of discretion when directing other employees will be considered a supervisor, notwithstanding that the "source" of that discretion is the individual's professional or technical expertise.

In the instant matter, Regional Director painted the entire case with a broad-based brush, boldly proclaiming that "the judgments of the charge nurses are so circumscribed by existing policies, orders and regulations of the Employer that [the nurses] do not do not exercise independent judgment within the meaning of Section 2(11)." The Regional Director follows this statement with a thread-bare analysis that not only ignores the relevant case law, but also makes short shrift of the record evidence. Significantly, *even if some* of the assignment and direction provided by the nurses is constrained by specific employer policy, that does not establish that the nurses lack supervisory authority. In order to meet its burden, the Employer must only demonstrate that *some portion* of the nurses' supervisory authority is free from strict regulation by specific employer policy. Mid-America Care Foundation v. NLRB, 148 F.3d 638, 643, 158 LRRM 2705, 2709 (1998). The issue that stems from the Regional Director's Supplemental Decision, therefore, is whether the nurses-at-issue exercise independent judgment while performing *some portion* of their activities assigning and directing employees.

In order to resolve the ultimate issue, it is first necessary to determine what constitutes "independent judgment." Because the Board has been applying the wrong test for supervisory status, there is no coherent, reliable body of Board decisions analyzing whether nurses use independent judgment when issuing the same type of direction and assignment as the RNs and LPNs in the instant case. In short, all of the Board decisions that analyzed "independent judgment" prior to Kentucky River must be viewed with a critical eye.

Although cases decided by the Board before Kentucky River must be viewed with skepticism because the Board was applying the wrong test, there is a certain body of relevant cases that can be safely relied upon — namely, those cases decided in the circuits where the respective courts have, just like the Supreme Court in Kentucky River, rejected the Board's standard. It is obviously

appropriate and necessary to consider the facts surrounding the nurses' direction of employees in these cases, and to compare those facts with the facts of the present case.[5]

Upon reviewing the category of reliable cases — *i.e.*, those in which the court applied a standard consistent with the Court's decision in Kentucky River — the conclusion is inescapable that the nurses-at-issue are statutory supervisors. Several relevant cases are discussed in turn.

In Kentucky River Community Care, Inc. v. NLRB, 193 F.3d 444, 162 LRRM 2449 (6th Cir. 1999) — the case reviewed by the Supreme Court[6] — the court described the RNs' supervisory duties as follows:

> The registered nurses at KRCC direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments.

193 F.3d at 454. Relying upon these facts, the appellate court concluded that the RNs were statutory supervisors. Id. A comparison between Kentucky River and the present case reveals that the nurses in the two situations have a comparable amount of authority relative to the direction of employees. The Sixth Circuit Court of Appeals, applying the proper standard, concluded that the nurses in that case were supervisors. The same conclusion should be reached in the present case.

In NLRB v. Attleboro Associates, Ltd., 176 F.3d 154, 161 LRRM 2139 (3rd Cir. 1999), the LPN charge nurses "set, or assist[ed] in setting, daily assignments for CNAs," and they held general supervisory authority over the CNAs' duties. 167 F.3d at 166. They also had the power to

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[5]Inexplicably, the Regional Director chose to completely ignore all such cases.

[6]The Supreme Court did not analyze the facts of Kentucky River under the newly enunciated test. Instead, because the Board applied an improper legal standard, the Court simply declined to enforce the Board's order. Kentucky River, 121 S.Ct. at 1871.

reorganize the schedule or request additional CNAs in the event of an emergency. Id. at 167. The court rejected the Board's "independent judgment" standard, just like the Supreme Court did in Kentucky River. Id. at 166-170. Applying the proper standard, the court concluded that the LPN charge nurses were supervisors by virtue of their authority to assign and direct CNAs. In particular, the court was impressed with the power of the LPN charge nurses to reorganize the schedule or request additional CNAs in the event of an emergency; according to the court, "[t]his power, by itself, shows that an LPN charge nurse exercises here authority to assign and direct *by using independent judgment.*" Id. at 167 (emphasis added) (*citing* Glenmark Assoc. Inc. v. NLRB, 147 F.3d 333, 343, 158 LRRM 2582 (4th Cir. 1998)). The nurses-at-issue in the present case have more authority to direct the work of the CNAs than the LPN charge nurses in Attleboro, and they exercise no less independent judgment. The court in that case concluded that the LPNs were supervisors when applying the proper standard. It should be concluded that the nurses in the present case are, likewise, statutory supervisors.

Glenmark, *supra*, also supports the conclusion that the nurses in the present case are §2(11) supervisors. In Glenmark, the Fourth Circuit Court of Appeals rejected the Board's "independent judgment" standard, consistent with the Supreme Court's decision in Kentucky River. 147 F.3d at 339-340. In Glenmark, the court considered the supervisory status of nurses at two facilities — Cedar Ridge and Point Pleasant. At Cedar Ridge, the LPNs had the authority to call CNAs in to work and to change their hall assignments. Id. at 341. The LPNs also had the authority to change CNA break schedules and allow CNAs to go home early. Id. On the basis of the LPNs' authority to make these schedule changes, the court concluded that they were supervisors. Id. at 341-342. Specifically, the court wrote:

Quite obviously many scheduling decisions made "routinely" by the LPNs at Cedar

> Ridge must require independent judgment. The Board mistakenly assumes that because there is an established procedure for handling a particular scheduling situation, nobody is required to think. In the Board's view, LPNs just mechanically follow established procedure. The record before us reveals the fallacy of the Board's logic. Although there is a general procedure in place regarding whom to call to work should an absence occur, on some occasions the LPNs, either the charge nurse or any floor nurse, exercise their independent judgment and decide to operate the nursing home or their floor shorthanded. Record testimony demonstrates that LPNs on the floor have the authority to allow CNAs to leave Cedar Ridge early, and when that occurs they generally reassign the remaining CNAs to ensure adequate patient coverage. In other situations, where the charge nurse is confronted with a floor in which patients are sicker than usual, the charge nurse may make a decision to assign an additional CNA to that area.

Id. The court specifically concluded that assigning CNAs to a certain area in order ensure proper patient coverage requires independent judgment. According to the court:

> The authority to assign workers constitutes the power "to put [the other employees] to work when and where needed." Such decisions are, in our view, inseverable from the exercise of independent judgment, especially in the health care context where staffing decisions can have such an important impact on patient health and well being.

Id. (citation omitted). The nurses-at-issue in the present case have the same authority with respect to scheduling as the LPNs at Cedar Ridge, and they exercise the same level of independent judgment. Insofar as the court in Glenmark (using the proper Kentucky River test) concluded that the LPNs in excercised independent judgment and were supervisors, the same decision should be reached here.[7]

The court in Glenmark also found that the nurses at Cedar Ridge were supervisors by virtue

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[7]Significantly, the record demonstrates that the skill and experience level of the CNAs varies, and that the RNs take this into account when assigning a CNA to a particular task or a certain patient. (Tr. 68-69). "The Board and the federal courts 'typically consider assignment based on assessment of a worker's skills to require independent judgment and, therefore, to be supervisory.'" Franklin Home Health Agency, 337 NLRB No. 132 (2002) (*quoting* Brusco Tug & Barge Co., 247 F.3d 273, 276, 167 LRRM 2148, 2152 (D.C. Cir. 2001)). In addition, contrary to the suggestion of Regional Director, the decision to *require* staff to leave early or stay past the end of their shift is not based upon the strict application of a mathematical formula, but rather the nurse's independent assessment as to what is needed under the circumstances.

of their role as the highest authority in the building for two of three shifts each day, plus all weekend. Id. at 341. The court wrote:

> We cannot fathom the Board's position that for more than two-thirds of the week at a nursing home providing 24-hour care, where patient conditions can change on a moment's notice, there is no one present at the facility exercising independent judgment regarding proper staff levels and patient assignments.

Id. The Regional Director erroneously failed to recognize that the role of the RN as the top person in the building on evenings and weekends (Tr. 51-52, 181-182) establishes supervisory status. *See also* Grancare Inc. v. NLRB, 137 F.3d 372, 376, 157 LRRM 2513, 2515 (6th Cir. 1998) (concluding that charge nurses were supervisors because a contrary finding would render the facility without supervisory personnel almost half the time, which is "not a reasonable conclusion for a well-run nursing home").

The court in Glenmark relied upon scheduling factors to conclude that the RNs and LPNs at Point Pleasant were also supervisors. At Point Pleasant, the nurses had the authority to decide whether to use the call-in procedure to fill an emergency staff shortage, as well as the authority to reorganize the schedule to accommodate patient emergencies. 147 F.3d at 343. Applying the proper "independent judgment" standard, the court concluded that these nurses were supervisors. Id. Again, the nurses-at-issue in the present case have the same type of authority and exercise the same level of independent judgment as the RNs and LPNs at Point Pleasant. Accordingly, the same conclusion must be reached.[8]

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[8]Another case decided by the Fourth Circuit Court of Appeals (again, applying the proper test) also supports the conclusion that the nurses at issue here are supervisors. In Beverly Enterprises, Virginia, Inc. [Carter Hall Nursing Home] v. NLRB, 165 F.3d 290, 297-298, 160 LRRM 2217 (4th Cir. 1999), the court concluded that the nurses were supervisors where, like here, they had the authority to assign and direct the nursing assistants, send them home if necessary, make daily assignments, alter break times, adjust schedules, and decide whether to call in replacements.

As demonstrated by the above discussion, in cases where courts have applied a standard consistent with the Supreme Court's decision in Kentucky River, they have concluded, under facts very similar to the present case, that the nurses exercised independent judgment and were statutory supervisors. The Regional Director improperly ignored all of these analogous cases, substituting his own cursory analysis. The record evidence and relevant cases mandate a conclusion that the nurses-at-issue in the present case are statutory supervisors, since they possess and exercise the authority to direct and assign employees while exercising independent judgment.

## V. CONCLUSION

For the above reasons, it must be concluded that the Employer's RNs and LPNs are statutory supervisors. Accordingly, the Board should revoke the Certification of Representative issued on April 14, 1999 and dismiss the two representation petitions.

Dated: September 11, 2002

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## AFFIDAVIT OF SERVICE BY MAIL

**STATE OF MINNESOTA )**
**)SS**
**COUNTY OF HENNEPIN )**

Jennifer L. Egge, City of Minneapolis, County of Hennepin, State of Minnesota, being duly sworn upon oath, says that on the 11th day of September, 2002, she served the annexed Employer's Second Request for Review on the following person(s) at their last known address, by placing said envelope with said contents in the United States Mail at Minneapolis, Minnesota:

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Subscribed and sworn to before me
this 11th day of September, 2002.

Cassie D. Buresh
Notary Public

CASSIE D. BURESH
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES
JANUARY 31, 2005